IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 324 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT
and
Hon'ble MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BABULAL MISHRAJI PUROHIT

Versus

STATE OF GUJARAT

Appearance:
MRS SHILPA J UNWALLA for Appellant
MR KT DAVE, APP for Respondent

CORAM : MR.JUSTICE Y.B.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 04/07/2002

ORAL JUDGEMENT (Per : MR.JUSTICE J.R.VORA)

1. The present appellant Babulal Mishraji Purohit along with Kasamali Gulamdawood Musalman were prosecuted

in a Special Case No. 40/2000 in the Court of Special Judge, Banaskantha at Palanpur, for the offences punishable under Sections 17 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985. Vide judgment and order dated 16th of February, 2002, Special Judge, Banaskantha at Palanpur acquitted original accused No.1 Kasamli Gulamdawood Musalman and convicted present appellant accused No.2 for the offence proved against him under Section 17-C of the Narcotic Drugs & Psychotropic Substances Act, 1985 and he was sentenced to minimum sentence of 10 years and fine of Rs. 1 lacs, in default, the present appellant was ordered to undergo one years simple imprisonment.

2. As per the brief facts of the case, on 7.2.2000 LCB Police Inspector of Palanpur Branch Mr. P.B. Patel got the information at 1300 hours that on the same day at about 4.00 p.m. near Disa R.T.O., checkpost on road going to Dhanera two persons on a scooter of Priya Make bearing No. GJ2 5731 are likely to transport narcotic substances. Police Constable Pravinchand Harilal was present in the office of Mr. P.B. Patel who noted down this information under instruction of P.I. Patel, who then called the staff of special squad in his office i.e. Police Sub-Inspector R.M. Bhadoria and other staff members, ASI Kalandarkhan Kalumiya, Head Constable Khumansinh Ramaji, Khumaji Ramaji, etc. They appeared in the office of Police Inspector Mr. Patel. They were all informed about the information received by Mr. P.B. Patel and were sounded about the raid to be carried on. The information received was taken on register and a copy was sent to the Superintendent of Police, Banaskantha, in a confidential cover through control room. Mr. Patel also arranged the presence of two panchas and a person who can weigh the substances with scale. Mr.Patel secured the presence of Dhanjibhai Khimjibhai Jadav and Dineshkumar Chandulal Joshi as panchas and one Nareshkumar Chamanbhai Patni with scale. A preliminary panchnama in the presence of panchas and in the presence of Nareshkumar was drawn during 1400 hours to 1430 hours, and thereafter all the persons of above special squad along with two panchas and Nareshkumar under the leadership of Mr. Patel and in Vehicle No. PB 57 at about 15.10 hrs. for arranging a raid reached near Disa RTO Checkpost at Dhanera cross roads. It was instructed that the police vehicle should be parked on the road in horizontal directions. The other persons were stationed around the spot and were on watch. At about 16.25 hours, a scooter of Priya Make and of the description which was given by the informant approached near the RTO checkpost. On attempt of the police, the scooter was halted and

ultimately stopped. The squad party along with panchas and Nareshkumar immediately rushed to the scooter and the scooter was surrounded. In the presence of panchas, the names of two persons who were riding the scooter were asked. The person who was driving the scooter gave his name as Kasamali Gulamdawood Musalman i.e. accused No.1 in the Special Case. The other person was the pillion rider, gave his name as Babulal Mishraji Purohit, resident of village Lundarada, taluka Shivana (Rajasthan) i.e. accused No.2 and appellant herein. At that time he was residing at village Kuchhawada, Taluka Disha. The appellant was having one heavy weight miniya (of waterproof material) bag in his possession which was held by both hands. Both of them were informed that the special squad had information that there was narcotic drugs or a substance with them and they were required to be searched along with this scooter. Both of them were informed that their search, if they demand, would be made by other gazetted officer, which would be arranged by the Police. Both of them i.e. Kasamli Gulamdawood Musalman and Babulal Mishraji Purohit - present appellant did not want to be searched in presence of other Gazetted Officer. They were also informed that they were free to search the police staff along with panchas and Naresh. Both the persons denied that offer also. Thereafter both the persons were asked to get down from the scooter and scooter was parked nearby. Kasamali was searched thoroughly. Nothing was found objectionable from his person while when appellant was searched nothing was found from his person but while heavy bag which he was carrying was opened in the presence of panchas, there were three cloth bags inside this main bag. These three cloth bags which were stitched were taken out. After opening the stitches of each of the cloth bags, black soft substance was found in all the three cloth bags. This substance was tested by the Police as well as panchas by smelling and was found to have opium like smell. Both of them were asked about pass or permit for having kept this opium with them, but nothing was offered. The scooter was also searched but nothing objectionable was found. Thereafter, Nareshkumar weighed all the three small bags and that was found to be weighing 2 Kgs and 900 grams. Out of three bags of Opium, some opium was taken out from each of the bags. Then two lumps were prepared of the sample of opium, each weighing 15 gms. and thereafter both the samples as well as the main opium were seized and sealed and a panchnama was prepared and seal of PI, LCB, Banaskantha, Palanpur was affixed along with the slip of signatures of the panchas. The opium which was taken out of a sample in two lumps were given mark as 'A & A1'. The arrest memo

as well as seizure memo have also prepared and both the accused were arrested at 18.15 hours. Thereafter Mr. Patel gave complaint which was recorded at Disa Rural Police Station. Muddammal was also handed over to PSO Disa Rural Police Station. The PSO, Disa Rural Police Station entrusted the investigation to Raghuvirsinh Mahadevsinh Bhadoria, PSI, LCB and after investigation he filed chargesheet against both the accused including appellant in the court of Special Judge, Banaskantha at Palanpur, which was registered as Spl. Case No. 40/2000.

3. A charge at Exh. 5 was framed against both the accused under Section 17 read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 to which both the accused pleaded not guilty. After recording the evidence and hearing the parties as aforesaid, learned Special Judge vide his judgment and order dated 16.2.2002 acquitted original accused No.1 and convicted present appellant - accused No.2 as aforesaid. Being aggrieved and dissatisfied with the above said judgment convicting the present appellant, this Appeal has been preferred by him through jail.

4. At this admission stage, we have heard at length learned Advocate Mrs. Shilpa J. Unwala, on behalf of the appellant.

5. Mainly it was urged that the charge against the accused is defective inasmuch as a joint charge was framed. It was urged that the case of the prosecution was a joint possession and if one accused is acquitted in a case of joint possession, the other accused i.e. present appellant cannot be convicted on the charge of Sec. 29 of the Narcotic Drugs & Psychotropic Substances Act. It was vehemently urged that the raid was carried out by the special squad on prior information. A breach was committed as mandated by Section 42 of the Narcotic Drugs and Psychotropic Substances Act. The raid was carried out on prior information and prosecution failed to establish that the same was reduced in writing and was sent to the immediate official superior as mandated under Section 41(2) of the Narcotic Drugs and Psychotropic substances Act, 1985 and hence this breach vitiates the prosecution case, and also vitiates the conviction of the appellant. It was next urged that panchnama of Exh. 16 is not proved by which the mudammal opium is seized. It was urged that only one panch of such panchnama was examined who did not support the prosecution case while the other panch of panchnama Exh.16 has not been examined. It was also next urged that the muddammal

substance was weighed along with its containers including miniya bag. It was urged that it may prejudice the case of the accused appellant to the extent of punishment which is provided by the amending Act differently for the small quantity and the commercial quantity. Likewise it was also urged that it is the prosecution case that opium contained in three different cloth bags, it was the duty of the Investigating Officer to obtain sample in each of the bags. Instead, Mr. Patel, PI, who conducted the raid, obtained samples from three bags and lumped three samples and out of this sample, one of the samples was sent to the Forensic Science Laboratory. An apprehension was expressed that in all the bags there may not be opium but some other narcotic substances, which may invite lesser punishment. It was urged that a prejudice is caused to the appellant - accused.

6. We have gone through the records which are available to us and documentary as well as collection of oral evidence. After considering and re-appreciating the evidence and the circumstances of this case, we have found that there is no substance in this appeal and the contentions raised on behalf of the appellant could not be sustained.

7. While we carefully scrutinise the charge framed against the accused at Exh.5 we found no defect at all in the charge. The charge is to the effect that at the relevant time accused No.1 Kasimali Gulamdawood Musalman was driving a scooter and the present appellant was pillion rider. The charge further reads that from accused No.2 i.e. present appellant narcotic drug i.e. opium was found to the extent of 2 kgs. 900grms. The charge further reveals that this opium was kept by both the accused and therefore both the accused were liable for the punishment under Sec. 17 read with Sec. 29 of the Narcotic Drugs and Psychotropic Substances Act. On this charge, it was urged that it was a case of joint possession and when possession of one accused is not believed, the possession of the narcotic substance of the other accused could not be believed. It was urged that the individual charge ought to have been framed. We could not appreciate this argument on behalf of the appellant - accused because both the accused were found on the same scooter and of the two, only the pillion rider was found in the possession of contraband opium. Now, the concept of joint possession as advanced is not material. The material issue would be who was in conscious possession of contraband article. The prosecution was able to prove that the pillion rider i.e. present appellant - accused No.2 was in conscious

possession of opium while prosecution according to learned Special Judge was not able to prove the conscious possession of opium by accused No.1 Kasamali Gulamdawood Musalman and hence the appellant came to be convicted. Had the prosecution, according to the Special Judge, been able to prove joint conscious possession of both the accused, the Special Judge might have convicted both the accused. Further Section 29 is a punishing Section for abatement and criminal conspiracy. Abatement, according to the Special Judge, so far as it relates to accused No.1 could not be proved while conscious possession of present appellant was proved. So, the offence which was charged against the present appellant under Section 17 of the Narcotic Drugs & Psychotropic Substances Act was proved while offence against appellant No.1 for the offence under Section 17 read with Section 29 of the Act was not proved and hence the contention that since the abatement and criminal conspiracy under Sec. 29 is not proved, the offence under Section 17 against the present appellant is not proved, cannot find favour and must be rejected.

8. The second vehement contention raised was regarding nonobservance of mandatory provision of Section 42 of the Narcotic Drugs & Psychotropic Substances Act. It was urged that the prosecution says that P.I. Patel had received prior information which was required to be sent to the immediate superior as per Section 42 (1) and (2). It was contended that the prosecution has not proved that the information which was reduced to writing was sent to the immediate superior.

9. We shall have to revert back to the facts of the case as narrated above to perspectively consider the contention raised. The fact goes to suggest that the contravened article was found near RTO Checkpost on a public road leading to Dhanera from the appellant and from inside the bag which he was carrying with both hands as pillion rider of this scooter. While both the accused were riding on a scooter and the present appellant being pillion rider was having in his possession the contraband goods, the question arises whether Section 42 of the Narcotic Drugs & Psychotropic Substances Act, 1985 applies to the present facts of the case. It was contended that since the raid was arranged on prior information and that was taken down in writing, it was the duty of the raiding officer to comply with all the provisions of Section 42 even though the contraband article was ultimately found in a public place. It is an admitted fact that the contraband was found from the possession of the appellant in a public place and on a

public road. Learned Advocate for the appellant relied upon a decision of the Supreme Court, reported in the case of ABDUL RASHID IBRAHIM MANSURI vs. STATE OF GUJARAT, reported in AIR 2000 SC 821. Our attention was drawn to para 14 of the decision of the Apex Court. Para 14 reads as under :

"14. In this case PW-2 admitted that he proceeded to the spot only on getting the information that somebody was trying to transport narcotic substance. When he was asked in cross-examination whether he had taken down the information in writing he had answered in the negative. Nor did he even apprise his superior officer of any such information either then or later, much less sending a copy of the information to the superior officer. However, learned counsel for the respondent - State of Gujarat - contended that the action was taken by him not under Section 42 of the Act but it was under Section 43 as per which he was not obliged to take down the information. We are unable to appreciate the argument because, in this case, PW-2 admitted that he proceeded on getting prior information from a constable and the information was precisely one falling within the purview of Section 42(1) of the Act. Hence PW-2 cannot wriggle out of the conditions stipulated in the said sub-section. We, therefore, unhesitatingly hold that there was noncompliance with Section 42 of the Act."

10. We are unable to uphold the contention that in the present set of circumstances, Section 42 of the Narcotic Drugs & Psychotropic Substances Act was applicable and the raiding officer was bound to observe the mandate of Section 42. The raid in question was conducted on public place and hence in our considered view in the present facts of the case, Section 42 would not be attracted at all. The Legislatures have enacted Section 43 in the Narcotic Drugs & Psychotropic Substances Act. Needless, it is to mention that Section 42 relates to entry, search, seizure and arrest and to enter into and search any building, conveyance or enclosed place, between sunrise and sunset. These powers are given to the officers named in Section 42 but subject to condition that in case of prior information or a personal knowledge if such raid is to be conducted, then the belief or information must be taken down in writing, and shall forthwith be forwarded to immediate superior officer. While Section 43 of the said Act is enacted to confer power of seizure and arrest in a public place. Even a plain reading of Sec.43 makes it sufficiently

clear that for the purpose of seizure and arrest in public places, no conditions as have been mentioned in Section 42, are attracted. Relative scope of Sections 42 and 43 undoubtedly establishes that when arrest, seizure is made in public place, the same will be under Section 43 and not under Section 42. This concept is made clear by the decision of the Division Bench of this Court in the matter of HIMMAT PETHABHAI VANKAR vs. STATE OF GUJARAT, reported in 1996 (2) GLR 832, where this Court in para 7 observed as
under :

"7. It was lastly contended that after receiving the information, the police officer did not take down the same in writing and send the copy thereof to his immediate official superior as provided under Sec. 42 of the N.D.P.S. Act. In our view, Sec. 42 would not apply to the present case. The search, seizure, arrest were all made in the public place soon after receipt of the information; and therefore, Sec. 43 of the NDPS Act would come into play which does not mandate that information received in such cases should first be reduced into writing and sent to the immediate superior officer. To buttress our view a reference of the case of State of Punjab v. Balbir Singh, reported in AIR 1994 SC 1872 : 1994 (3) SCC 299 may be made. It is held therein that the empowered officer while acting under Section 42 records grounds of his belief on the basis of personal knowledge or take down in writing the information about the commission of the offence under the NDPS Act he has to send a copy thereof to his immediate official superior; but such officer acting under Sec. 43 is not required to record of his belief. If he has prior information from any person, it is also not required to be taken down in writing for onward transmission. In this case the search, seizure and arrest were made in the public place and not in the building, conveyance or enclosed place and therefore, not Sec. 42 but Sec. 43 of the NDPS Act will come into play. When that is so, the police officer in this case was not bound to act as mandated by Sec. 42 and canvassed by the appellant's leaned Advocate."

11. This ratio is based on a decision of the Supreme Court in the case of State of Punjab vs. Balbir Singh, reported in AIR 1994 SC 1872, wherein in para 10, the Supreme Court was pleased to observe that the empowered officer while acting under Sec. 43 is not required to

record any reason of his belief. Section 43 also does not mention anything about the empowered officer having prior information given by the person or about recording the same as compared to Section 42. It is therefore clear that when search is conducted in a public place, may it be in pursuance of personal belief or on information received, the empowered officer is not bound by the mandate of Section 42. This is made more clear by the later decision of the Supreme Court in the case of SAYAR PURI vs. STATE OF RAJASTHAN, reported in 1998 SCC (Cri) 1681, wherein the Supreme Court observed that for a seizure on a public road, the procedure under Section 42(2) of the Act was not required to be followed. Hence the contention that the mandate of Section 42 in this case was not observed is wholly misconceived. The case of Abdul Rashid Ibrahim Mansuri (supra) cited by the learned Advocate for the appellant does not lay down the ratio, that even if search is made in public place, Sec. 42 applies because the raid is carried in pursuance of prior information. On the contrary, when we refer to the facts of that case, we find that there was a case wherein contraband article was found from inside the rickshaw in gunny bags. Therefore, that was a case of search of a vehicle from inside and was covered by Section 42. In the present case, admittedly, contravened article was found from the handbag carried by the appellant as a pillion rider of the scooter and, therefore, in the facts of the present case, it was not necessary for the raiding officer to observe the provisions of Section 42. However, even if we examine the case from yet another angle, the prosecution was able to prove that the information which the raiding officer had received was taken down in writing and was sent to his immediate superior officer. This is evident from the evidence of complainant Exh. 15 Panchabhai Bhagwanbhai Patel, PI, LCB, Palanpur. This fact is further corroborated by the evidence of Exh. 19, which is the office copy of the forwarding letter to the superior officer of the information received by P.I. Patel. Exhibit 20 is the note made by P.I. Patel in respect of the information which he received. When we re-appreciated the evidence of Mr. Patel along with these documents, we do not have the slightest doubt that he did record the information which he received and reduced the same in writing and forwarded the same to his immediate superior officer. It is not the requirement of the law that prosecution is bound to prove that immediate superior officer had received the information sent by the raiding officer. Hence, on the facts of the case, prosecution was able to prove that the information which P.I. Patel received was duly reduced into writing and that he sent it to his

immediate superior i.e. PSO Banaskantha at Palanpur immediately. Therefore, on any count this contention on behalf of the appellant countenanced and requires to be rejected.

12. Now, we shall consider the contention raised that the panchnama is not proved because only one of the panchas examined and he is declared hostile. The person i.e. witness Nareshkumar Chamanbhai Patni Exh. 12 who weighed muddamal article has not supported the prosecution case. It was also contended that the mudammal was weighed including the bags. The method of collecting samples from the bags was also improper.

13. It is not the law that if the panchas of panchnama turn hostile, the case of the prosecution becomes doubtful, but law is if the evidence of police witnesses on scrutiny inspires confidence, then in spite of the hostile panchas, conviction can be based on the evidence of police witnesses. We have scanned and reappreciated the evidence in this case. To prove the prosecution case, in spite of the panchas, Panhabhai Patel who conducted the raid, is examined at Exh.15. He has narrated how he received the information, how he noted it down and was sent to his superior officer. He deposed how the raid was carried out and how the muddamal was seized and sealed. He had produced documentary evidence in support of his say. When we appreciated the cross-examination of this witness, we found that nothing could be extracted from this witness by the defence so as to shake the case of the prosecution against the present appellant. Suggestions are put forward which have been denied by the witness. A suggestion is also advanced that in fact on 6th February, 2000 unattended and unclaimed muddamal was found near Kuchhawada Bus stand and that muddamal was tagged with the appellant in this case. The allegation was denied by the witness emphatically. The prosecution also examined at Exh. 12 witness Nareshkumar who weighed opium from the appellant. So far as the incident is concerned, this witness supports the case of the prosecution, but in deposition he says that he could not give the names of accused nor could identify them in the court and on this aspect he was declared hostile by the prosecution. But the evidence of this witness could not find favour so far as the present appellant is concerned. On the contrary, it supports the prosecution case at least to the extent of seizure of opium and weighing the same. He has given certificate of weighing muddamal which is at Exh.13. In deposition this witness sticks to this certificate and nothing could be brought about by the defence in this

respect. To that extent reliance must be placed on this witness. Prosecution examined the members of raiding party at Exh.35, ASI Kalandarkhan Kalumiya at Exh.40, Head Constable Ratandan Gadvi, at Exh. 43 Kalubhai Dalabhai, who had fully supported the case of the prosecution right from the beginning to the seizure of muddamal. It is also proved by the deposition of Ratandan - Exh. 40 that muddamal was in sealed condition entered into muddamal register vide Entry No.33/2000 and was duly sent to Forensic Science Laboratory. Exh. 43 Kalubhai is also supporting this fact narrated by Constable Ratandan Gadvi. At the relevant time, this witness Kalubhai was serving at Disa Rural Police Station and he accepted the muddamal from Head Constable Ratanlal. They cannot be shaken by the defence in the cross-examination. Exh. 45 is witness Chandugar Devgar who recorded and registered the complaint of complainant P.I. Patel in Disa Rural Police Station because he was PSO of Disa Rural Police Station at that time. Investigating Officer Exh. 49 PSI Raghuvarsinh Bhadoriya is examined and he was also a member of raiding party. He fully supports the case of the prosecution. All these witnesses appear to be natural and extremely truthful. Nothing could be brought about adverse by the defence. Only some suggestions were put in cross examination and in further statement, appellant explained without anything on record to this effect that the police had found unclaimed muddammal of opium and that was tagged with the present appellant. There is not an iota of evidence on record to come to the conclusion that why all these police officers would falsely involve the present appellant in the serious crime. No enimity with the police could be shown by the appellant during trial. There is no reason to cast any doubt and trurthfulness of the prosecution case which is proved by the Police Officers against whom no slightest ill-motive could be impugned by the defence. Therefore, we are not inclined to accept the argument that this case rests only on the police witnesses which could be disbelieved. No such contradiction could be shown from the evidence which would destroy the prosecution case.

14. FSL report produced on record at Exh. 51 clearly establishes that what was found from the appellant was opium as defined in the Narcotic Drugs & Psychotropic Substances Act, 1985. The apprehension shown by the appellant is that since the samples were not collected separately and individually from three bags, the case of the appellant is prejudiced. Had it been so, as has been argued, there would be other substances in each of the packets, and the same would have been revealed during

examination in Forensic Science Laboratory. Therefore apprehension expressed is baseless.

15. Having fully scrutinised the evidence on record and screened the circumstances carefully, we find that the Special Judge came to the right conclusion to convict the present appellant for the offence proved against him under Section 17(c) of the Narcotic Drugs & Psychotropic Substances Act,1985. We do not find any reason to interfere with the judgment and order impugned in the Appeal.

16. In the result, for the reasons aforesaid, this Appeal stands dismissed.

(Y.B. Bhatt, J.)

(J.R. Vora, J.)